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San Jose Police Officers' Association

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SANTA CLARA
13

14 SAN JOSE POLICE OFFICERS'
ASSOCIATION,

15 Plaintiff,
16

17 v.

18 CITY OF SAN JOSE, BOARD OF
ADMINISTRATION FOR POLICE
19 AND FIRE DEPARTMENT
RETIREMENT PLAN OF CITY OF
20 SAN JOSE, and DOES 1-10,
inclusive,

21 Defendants.
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No. 1-12-CV-225926

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF
FOR:**

- (1) VIOLATION OF CALIFORNIA
CONSTITUTIONAL CONTRACTS CLAUSE;
- (2) VIOLATION OF CALIFORNIA
CONSTITUTIONAL TAKINGS CLAUSE;
- (3) VIOLATION OF CALIFORNIA DUE
PROCESS;
- (4) VIOLATION OF CALIFORNIA FREEDOM
OF SPEECH—RIGHT TO PETITION;
- (5) VIOLATION OF SEPARATION OF
POWERS DOCTRINE;
- (6) BREACH OF CONTRACT;
- (7) VIOLATION OF MMBA;
- (8) VIOLATION OF CAL. PENSION
PROTECTION ACT.

1 Plaintiff SAN JOSE POLICE OFFICERS' ASSOCIATION ("SJPOA" or
2 "Plaintiff") on behalf of its members brings this action for declaratory, injunctive and
3 other relief asking the Court to declare unconstitutional and temporarily and permanently
4 enjoin implementation of proposed changes to the San Jose Police and Fire Department
5 Retirement Plan:

6 1. Plaintiff challenges provisions of "The Sustainable Retirement
7 Benefits and Compensation Act," which was passed by the San Jose electorate as
8 Measure B at the June 5, 2012 election ("Measure B"), and which will amend
9 provisions of the San Jose City Charter in ways detrimental to the SJPOA and its
10 members. Unless restrained, Measure B will become effective immediately and
11 directs the City Council with the goal that implementing ordinances "shall become
12 effective no later than September 30, 2012."

13 2. Numerous provisions of Measure B violate the California Constitution
14 on their face and as applied to Police Officers who were participants in the 1961 Police
15 and Fire Department Retirement Plan ("Retirement Plan") on or prior to June 5, 2012,
16 in that Measure B:

17 a. substantially impairs these employees' contracts with the City of
18 San Jose for the Retirement Plan and benefits in place when they began working for
19 the police department, and as improved during their employment;

20 b. constitutes a taking of private property rights without just
21 compensation or due process;

22 c. violates their right to free speech and to petition the courts
23 through a "poison pill" that punishes employees if they successfully challenge portions
24 of Measure B;

25 d. violates the separation of powers doctrine by giving the City
26 ultimate authority over whether an unlawful ordinance implementing Measure B
27 should be amended or severed;

1 e. impairs SJPOA members' rights under their Memorandum of
2 Understanding ("MOA") with the City by unilaterally increasing contributions for
3 future retiree medical benefits above what is contractually agreed;

4 f. violates the Meyers-Millas-Brown Act ("MMBA"), Gov. Code
5 section 3500, *et seq.*, by unilaterally reducing employee salaries—a mandatory subject
6 of bargaining—if Section 1506-A of Measure B is declared invalid; and

7 g. violates the California Pension Protection Act by abrogating the
8 fiduciary duties of the Board of Administration for Police and Fire Department
9 Retirement Plan ("Retirement Board") to current and future retirees.

10 3. Hundreds of current Police Officers on whose behalf Plaintiff brings
11 this action will suffer severe and irreparable harm upon implementation of Measure B
12 and amendment of the Charter. Among other things, Measure B forces employees to
13 make the Hobson's choice between standing on their existing pension rights and
14 having their existing salaries reduced by as much as 16%, or "voluntarily" opting into
15 a second tier Retirement Plan with lesser benefits so they can keep their current
16 salaries. Measure B also has numerous other consequences for Police Officers as
17 further described herein, including detrimentally changing the definition of disability
18 retirement, authorizing suspension of cost-of-living adjustments, eliminating the
19 Supplemental Retirement Benefits Reserve program, and dramatically increasing
20 salary deductions for future retiree healthcare.

21 4. Measure B also discourages employees from exercising their freedom
22 of speech rights, including their right to petition the courts for redress. For example, it
23 specifically provides that if its lesser "voluntary" retirement program is "illegal,
24 invalid or unenforceable as to Current Employees . . . then . . . an equivalent amount
25 of savings shall be obtained through pay reductions." It also gives the City ultimate
26 authority to decide whether any implementing ordinance determined to be unlawful
27 should be "amend[ed] ... or ... sever[ed]," regardless of any court order obtained by
28 employees enforcing their rights.

JURISDICTION AND VENUE

5. All parties exist and reside within the County of Santa Clara, and all relevant actions and omissions took place within the County of Santa Clara, making this Court the appropriate venue for this action.

THE PARTIES

6. Plaintiff SJPOA is a California nonprofit unincorporated labor association representing over a thousand individuals working in Police Officer classifications in Bargaining Units 11, 12, 13 and 14 (collectively "Police Officers") employed by the City of San Jose. SJPOA's purposes include advocating for the interests of its members with respect to their collective bargaining rights, including their pension and retirement rights. SJPOA brings this action on behalf of itself and its members, having standing to do so under the doctrine articulated by the California Supreme Court in *Professional Fire Fighters v. City of Los Angeles* (1963) 60 Cal.2d 276, and *Int'l Assoc. of Fire Fighters v. City of Palo Alto* (1963) 60 Cal.2d 295.

7. The members of SJPOA are current employees of the City of San Jose who were induced to accept positions in and continued to work in the police department in reasonable reliance that they had the "collateral right to earn future pension benefits through continued service, on terms substantially equivalent to those" existing at the time they began working for the city, or enhanced during their service with the City. (*Legislature v. Eu* (1991) 54 Cal.3d 492; *Carman v. Alvord* (1982) 31 Cal.3d 318.)

8. Despite serving in the capital of Silicon Valley, San Jose Police Officers are amongst the lowest paid Police Officers in the Bay Area. They previously agreed to a 10% reduction in total compensation, effective since July 1, 2011 and continuing at least until June 30, 2012. They currently pay approximately 10.46% of their salary towards normal cost retirement contributions. They also currently pay an additional 7.01% of their salary towards retiree medical benefits—a contribution rate that far exceeds the industry standard. Under Measure B, Police Officers' payments

1 would substantially increase through additional salary deductions, further decreasing
2 their net income.

3 9. The City of San Jose ("City") is a charter city that employs the
4 members of SJPOA and has established the Retirement Plan. The City is governed by
5 the San Jose City Charter ("Charter") and by superseding state law. Labor-
6 management relations between the SJPOA and the City are governed by the MMBA.

7 10. The Retirement Plan is administered by Defendant Board of
8 Administration of the Police and Fire Department Retirement Plan ("the Board"),
9 whose primary fiduciary duties are to current and future members and their
10 beneficiaries. The Board has no authority over any changes to the design and terms of
11 the Retirement Plan. Its duty is to administer the Plan according to its terms. Pursuant
12 to Code of Civil Procedure section 389(a)(1), the Board is named herein solely as a
13 necessary and indispensable party because of its role in administering the benefits at
14 issue in this action; otherwise, complete relief cannot be accorded. *See* Cal. Civ. Proc.
15 Code § 389(a)(1). No damages, writ, injunctive or other relief, including attorneys'
16 fees or costs, is presently sought against the Board in this action.

17 11. The terms and conditions of SJPOA members' employment, including
18 their right to certain retirement benefits and their current salaries, are governed by a
19 MOA between the SJPOA and the City, which was entered into pursuant to the
20 Meyers-Millas-Brown Act, Government Code section 3500, et seq.

21 BACKGROUND

22 12. The San Jose City Charter establishes that the City has a duty to
23 establish and maintain a retirement plan for its employees. As further described
24 herein, the Charter mandates certain minimum retirement benefits for Police Officers.

25 13. The Retirement Plan applicable to Police Officers is contained in the
26 San Jose Municipal Code. The Charter imposes on the City a duty to keep the
27 Retirement Plan actuarially sound.

1 14. The Retirement Plan is funded by contributions from employees and
2 the City as specified in the funding provisions of the City Charter, Municipal Code,
3 and MOA.

4 15. In the spring and early summer of 2011, SJPOA and the City had
5 lengthy negotiations over retirement benefits during collective bargaining negotiations.
6 Specifically, the City represented that, according to its projections, retirement costs
7 were rapidly escalating and needed to be reduced.

8 16. The SJPOA and the City agreed to continue negotiations on pension
9 and retiree health care benefits for current and future employees, even though they had
10 reached agreement on the other terms and conditions of employment.

11 17. The City subsequently began a campaign to reduce all City employees'
12 pension benefits, including those of Police Officers, through a City-sponsored voter
13 ballot initiative and a threatened declaration of fiscal emergency. If implemented,
14 Measure B will amend the San Jose City Charter.

15 18. To support the City's efforts to declare a fiscal emergency and the
16 ballot measure, the City's mayor asserted repeatedly in public statements and press
17 releases that, by Fiscal Year ("FY") 2015-16, the City's retirement contribution costs
18 would reach \$650 million per year.

19 19. On July 5, 2011, certain City Council members formally proposed a
20 ballot initiative that would unilaterally reduce retirement benefits of all City
21 employees, including those represented by SJPOA. The ballot measure was
22 purportedly directed at reducing the City's retirement costs to FY 2010-2011 levels by
23 FY 2015-16.

24 20. The City's projected retirement contribution increases were partly
25 rooted in the City's reduced contributions during times when the Retirement Plan had
26 an actuarial surplus.¹ For example, in fiscal years 1993 through 2004 the City reduced

27 ¹ An actuarial surplus is defined as a situation where the actuarial value of the assets in the
28 retirement fund is more than the value of the plan's actuarial liability.

1 its contributions into the Retirement Plan by approximately \$80 million. The
2 Retirement Board later concluded in 2011 that, had the City not reduced its
3 contributions during that time period, the \$80 million would have grown to \$120
4 million. That increased the Retirement Plan's Unfunded Actuarial Liability by
5 approximately 44%.

6 21. On December 1, 2011, the independent actuary for the Retirement Plan
7 issued a report with updated projections for the City's prospective retirement costs
8 which showed that the City's retirement contributions would be far less than previously
9 estimated and far less than the City had been relying on as justification for the
10 proposed declaration of fiscal emergency and ballot measure. Specifically, the report
11 showed that the City's contributions for Fiscal Year 2012-13 for the Police and Fire
12 Retirement Plan would be approximately \$55 million less than previously expected.

13 22. At a City Council meeting on December 6, 2011, the Mayor withdrew
14 his proposal to have the City Council declare a fiscal emergency. Even though there
15 was no fiscal emergency, the City Council nonetheless proceeded with placing the
16 ballot measure before the voters.

17 23. On February 21, 2012, the City issued a revised ballot measure. On
18 March 6, 2012, the City Council voted to place that revised ballot measure ("Measure
19 B") on the June 5, 2012 election ballot. On April 10, 2012, the Sixth Appellate
20 District Court of Appeal found the ballot statement of issue was "impermissibly
21 partisan," and ordered the City to revise it, which it did.

22 24. Measure B was passed by the San Jose electorate on June 5, 2012. If
23 allowed to go into effect, Measure B will change SJPOA members' retirement benefits
24 and the Retirement Plan as further described below.

25 **POLICE OFFICERS' RIGHTS UNDER THE RETIREMENT PLAN AND MOA**

26 25. The Retirement Plan established by the pre-Measure B City Charter
27 and the San Jose Municipal Code gives Police Officers constitutionally-protected and
28 vested contractual and property rights to certain pension benefits and the right to

1 proceed under the Retirement Plan in place when they began working for the City, as
2 well as any improvements to those benefits made during their employment with the
3 City.

4 26. SJPOA members' benefits and rights became vested when they
5 accepted their positions with the City or, with respect to any improvements to those
6 benefits, when they continued laboring for the City. In exchange for these benefits and
7 rights, SJPOA members accepted their positions with the City and will continue to as
8 they have in the past dutifully labor for the City of San Jose.

9 27. The City Charter prescribes certain minimum benefits for Police
10 Officers. The Charter expressly states that the City "may grant greater or additional
11 benefits." There is no provision for reducing employee benefits or for reducing
12 benefits below the minimum in the Charter. As further described herein, Police
13 Officers' pension rights arise from the Charter, the Municipal Code, and the MOA.

14 28. **Service Retirement and Pension Calculation.** The Charter (Section
15 1504) establishes Police Officers' right to service retirement. The Municipal Code
16 provides that Police Officers are eligible to begin receiving service retirement benefits
17 at age 50 with 25 years of service, at age 55 with 20 years of service, or at any age
18 following 30 years of service. Upon retirement, they are entitled to a pension
19 calculated according to the following formula contained in Municipal Code section
20 3.36.809: 2.5% of final compensation for each year of service up to 20 years, plus 4%
21 of final compensation for each year of service between 21-30 years up to a cap of 90%
22 of final compensation.

23 29. **Disability Retirement and Pension Calculation.** The Charter
24 (Section 1504) establishes Police Officers' right to disability retirement and defines
25 "disabled" as "the incurrence of a disability . . . which renders the officer or employee
26 incapable of continuing to satisfactorily assume the responsibilities and perform the
27 duties and functions of his or her office or position and of any other office or position
28 *in the same classification of offices or positions* to which the City may offer to transfer

1 him or her" (emphasis added). Upon disability retirement, Police Officers are
2 entitled to a pension calculated according to the following formula in Municipal Code
3 section 3.36.1020: 50% of final compensation, plus 4% of final compensation for each
4 full year of service exceeding 20 years, to a cap of 90% of final compensation.

5 **30. Splitting of Normal Retirement Costs According to 3:8 Ratio.** The
6 Charter (Section 1504) and Municipal Code (Section 3.36.410) establish that Police
7 Officers contribute 3/11ths of the normal costs of maintaining the Retirement Plan, and
8 the City pays 8/11ths.

9 **31. City Pays All Unfunded Actuarial Liability ("UAL") for Pensions.**
10 The Municipal Code (Sections 3.36.1520 and 3.36.1550) establishes that the City pays
11 any UAL generated by the Retirement Plan.² Under the Retirement Plan, the City is
12 required to pay UAL and Police Officers did not pay UAL for pensions.

13 **32.** When the Retirement Plan generated an actuarial surplus, the City
14 reaped all of the benefits and used those excess earnings to reduce its contribution rates
15 during FYs 1993-2004 by approximately \$80 million. According to the Retirement
16 Board, that \$80 million would have grown to \$120 million and increased the existing
17 UAL by 44%.

18 **33. Yearly Cost of Living Adjustments ("COLA").** The Municipal
19 Code (Section 3.44.150) establishes Police Officers' right to an annual 3% COLA to
20 pension benefits upon retirement. The normal cost of the COLA is funded by
21 contributions from Police Officers and the City on a 3-8 basis (Section 3.44.090) to
22 fund the normal cost.

23 **34. Supplemental Retiree Benefit Reserve ("SRBR") Payments.** The
24 Municipal Code (section 3.36.580) also establishes a supplemental retirement benefit
25 reserve, funded from employee and City contributions and administered solely for the

26
27 ² UAL is "the difference between actuarial accrued liability and the valuation assets in a
28 fund. [Citation] Most retirement systems have [UAL]. . . . [UAL] does not represent a
debt that is payable [in full] today." (*County of Orange v. Association of Orange County
Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 34.)

1 benefit of Retirement Plan members, from which the Retirement Board has the
2 discretion to make a variable annual payment to retirees based on investment
3 performance.

4 **35. Contribution Rates for Retiree Healthcare.** Employee contribution
5 rates for retiree healthcare are established through the collective bargaining process.
6 Thus, the MOA sets Police Officers' contribution rates for retiree healthcare.
7 Specifically, contributions for retiree medical benefits are made by the City and Police
8 Officers on a 1:1 ratio. The MOA caps any increase in these contribution rates for
9 Police Officers at 1.25% per year. The MOA further provides that employees shall not
10 pay more than 10% of their pensionable salary to fund retiree healthcare. Currently,
11 SJPOA members pay 7.01% of their pensionable pay toward retiree healthcare costs,
12 which will increase to 8.26% on July 1, 2012 under the MOA.

13 **36.** In enacting the Charter and Municipal Code sections described above,
14 and by ratifying the MOA, the City expressly and/or implicitly intended to bind itself
15 to these terms for current Police Officers. These rights became protected vested rights
16 when these officers began working with the City (or continued to work following
17 benefit improvements), and cannot be legislated away by the City or by ballot
18 initiative. Nothing in the Charter and the Municipal Code prohibits the creation of any
19 implied rights.

20
21 **MEASURE B: "THE SUSTAINABLE RETIRMENT BENEFITS AND
22 COMPENSATION ACT"**

23 **37.** Measure B makes a number of significant and detrimental changes to
24 the Retirement Plan and to retiree benefits established in the MOA affecting Police
25 Officers. All of these changes were made without any consideration and without
26 giving Police Officers comparable new advantages.

27 **38.** By its own terms, Measure B will immediately amend the San Jose
28 City Charter and "prevail[s] over all other conflicting or inconsistent wage, pension or
post employment benefit provision in the Charter, ordinances, resolutions or other

1 enactments.” Some of these changes take place immediately, while others will require
2 implementing ordinances, though Measure B would appear to require that the City
3 begin promulgating such implementing ordinances right away. Measure B provides
4 that it is the goal that any implementing ordinances “shall become effective no later
5 than September 20, 2012.”

6 39. Measure B does not purport to retroactively change the pension
7 formulas for prior service years and only purports to apply prospectively.

8
9 **Sections 1506-A and 1507-A: A “Voluntary” Choice Between Giving Up the Right to
Current Level of Salary Now or Giving Up Future Retirement Benefits**

10 40. The core of Measure B is the misleadingly-titled “Voluntary Election
11 Program” (“VEP”) which creates “an alternative retirement program” that would
12 provide benefit levels that are *less* favorable than those outlined above. Employees
13 who “opt in” to the VEP will maintain their current salaries and the current 3:8 cost-
14 sharing ratio for the normal costs. By contrast, Police Officers who elect to remain in
15 the current Retirement Plan for future service credits will be forced to pay up to 50%
16 of the pension UAL through a reduction in their current salaries up to 16%. This
17 Hobson’s choice is contained in Sections 1506-A and 1507-A of Measure B.

18 41. Section 1506-A mandates that employees not entering the VEP will
19 have their salary reduced by as much as 16% in order to pay for up to half of the
20 pension UAL. Although Measure B styles this reduction as an “adjust[ment] through
21 additional retirement contributions,” Measure B would effectively require Police
22 Officers (who have never paid UAL contributions for their pensions) to offset the
23 City’s UAL costs through salary deductions resulting in reductions to take-home pay
24 without giving them any comparable advantage.

25 42. Section 1507-A sets out the VEP which caps employees’ pension
26 benefits and prospectively changes the pension formula for those employees
27 “voluntarily” “opting” into this system. Section 1507-A mandates that such
28 employees “will be required to sign an irrevocable election waiver (as well as their

1 spouse or domestic partner, former spouse or former domestic partner, if legally
2 required) acknowledging that the employee irrevocably relinquishes his or her existing
3 level of retirement benefits and has voluntarily chosen reduced benefits.”

4 43. The VEP imposes a reduced retirement benefits formula as follows:
5 2% of final compensation for each year of prospective service, up to a cap of 90% of
6 final compensation. It re-defines “final compensation” as “the average annual
7 pensionable pay of the highest three consecutive years of service.” Section 1507-A
8 also increases the retirement age to 57 for Police Officers, including the eligibility to
9 retire after 30 years of service, and disallows retirement before age 50. It caps COLA
10 increases at 1.5% per fiscal year. Finally, it imposes a new requirement that an
11 employee is eligible for a full year of service credit only upon reaching 2080 hours of
12 regular time worked, excluding overtime.

13 44. In exchange for giving up their rights, Police Officers entering the
14 VEP keep their current salaries, do not pay UAL and retain the 3:8 cost-sharing ratio—
15 rights which Police Officers already have. Police officers forced into VEP would thus
16 receive no comparable advantage for the waiver of their rights.

17 45. The VEP presents a Hobson’s choice that is unconscionable and
18 unlawful because current employees have no meaningful choice. The City is obligated
19 by the MOA to maintain contractual salaries and retiree healthcare contributions at the
20 agreed rate, and is also obligated by the Charter and Retirement Plan to pay Police
21 Officers the benefits under the retirement system in place when they began working
22 for the City, as well as any enhancements made during their service with the City. The
23 City may not lawfully renege on either of its obligations, let alone penalize current
24 employees for standing on their rights.

25 46. An employee’s election under the VEP is not “voluntary” at all and
26 fails for lack of consideration in the form of a comparable advantage because,
27 regardless of what decision an employee makes, he or she is forced to give up valuable
28 rights protected under the law. Further, any such choice is made under economic

1 duress because employees not electing the VEP have their salaries reduced by as much
2 as 16%.

3 47. Although the VEP would require IRS approval, Measure B mandates
4 that the "compensation adjustments" shall be effective regardless of whether IRS
5 approval has been given and regardless of whether the City Council has implemented
6 the VEP.

7 48. The City has known since at least January of 2012 that the VEP will
8 not receive IRS approval in 2012 and is likely never to receive such approval.
9 Nonetheless, the City Council voted to put Measure B, including the VEP, on the June
10 5, 2012 ballot.

11 **Section 1509-A: Evisceration of Disability Retirement Availability**

12 49. Section 1509-A of Measure B immediately and radically alters Police
13 Officers' rights to disability retirement by unilaterally imposing numerous burdensome
14 requirements, including that "City employees must be incapable of engaging in *any*
15 gainful employment for the City." (Emphasis added.) Specifically, Measure B re-
16 defines disability retirement for Police Officers by now requiring a determination that
17 an employee be unable to "perform *any other jobs* described in the City's classification
18 plan *in the employee's department* because of his or her medical condition."
19 (Emphasis added.) The practical effect for a Police Officer is that if he or she is able
20 to perform *any* function within the police department—including non-peace officer
21 functions—he or she is now ineligible for disability retirement. Under the current
22 Retirement Plan, such an employee would have been eligible for disability retirement
23 if he or she could not perform work within his or her own classification.

24 50. Measure B further requires that a disability retirement assessment be
25 made even if there are *no* positions for which an otherwise-disabled Police Officer
26 may be eligible—i.e., even if there are no vacancies for such jobs. That means that if
27 an otherwise-disabled employee is found to be able to perform non-peace officer
28 functions in his or her department but there is no available vacancy, that employee will

1 be ineligible for disability retirement. Even if there is an available vacancy, Measure
2 B would not require that the officer be placed in the vacancy. Under Measure B such
3 an employee would get *nothing* even though he or she was incapacitated in the line of
4 duty. Measure B does not provide employees with any comparable advantage for
5 taking away this right.

6 **Section 1510-A: Unfettered Right to Deny COLA Increases**

7 51. Section 1510-A gives the City the right to deny COLA increases to
8 non-VEP and VEP employees alike. Upon a unilateral declaration of “fiscal and
9 service level emergency” by the City Council, it allows the City to suspend COLA
10 increases to applicable retirees (defined as “current and future retirees employed as of
11 the effective date of this Act”) for up to five years. Measure B does not require that
12 the time period for which COLAs are suspended have any nexus to the declared
13 emergency. Nor does Measure B contain any definition of a “fiscal and service level
14 emergency” or even require that the City Council’s suspension of COLAs be
15 “reasonable” under the circumstances or reasonably related to the declared emergency.
16 Measure B does not provide employees with any comparable advantage for taking
17 away this right.

18 52. Any “suspend[ed]” COLA increases are automatically *forfeited*
19 because Measure B directs that COLAs “shall” only be restored “prospectively” and
20 even then only “in whole or in part.” Measure B provides no way for retirees to obtain
21 past COLAs to which they were entitled, nor does it provide a comparable advantage
22 for the loss of this protected right.

23 53. Additionally, Section 1510-A caps COLA increases once they are
24 “restore[d]” as follows: 3% for current retirees and non-VEP employees, and 1.5% for
25 VEP employees. There is also no requirement that any “restore[d]” COLAs be
26 “reasonable” under the circumstances or reasonably related to the declared emergency,
27 let alone any provision for affected employees to obtain past COLAs to which they
28 were entitled.

Section 1511-A: Elimination of SRBR

54. Section 1511-A eliminates the SRBR in whole and with it any supplemental benefits that Police Officers would have received during retirement, even though such employees have paid into the SRBR. It directs that any funds in the SRBR be placed in the Retirement Plan and mandates that any supplemental benefits other than those authorized by Measure B "shall not be funded from plan assets." Measure B does not provide employees with any comparable advantage for taking away this right.

55. Elimination of the SRBR will have detrimental effects upon retirement of Police Officers who paid into the SRBR in expectation they would receive that benefit.

Section 1512-A: Increases to Payment for Retiree Healthcare

56. Section 1512-A dramatically increases the amount that Police Officers will have to pay for retiree healthcare. Under Measure B, Police Officers would be required to pay a full 50% of the normal cost and unfunded liability for the retiree healthcare plan. This would have the effect of eliminating the 10% cap contained in the MOA and, consequently, resulting in a significant net salary decrease, as the combined cost is currently 32% of salary. That salary decrease is in addition to and cumulative with the other salary deductions under Measure B, which will have a detrimental impact on SJPOA members.

57. Additionally, Measure B detrimentally re-defines "low cost plan" to mean "the medical plan which has the lowest monthly premium available to any active employee in either the Police and Fire Department Retirement Plan or Federated City Employees' Retirement Plan." That effectively makes it impossible for the SJPOA to bargain over retiree medical benefits, as it will fix employees' benefits to the lowest cost plan City-wide, regardless of whether such plan was bargained for by another bargaining unit or unilaterally imposed on another bargaining unit by the City.

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1 62. Section 1515-A contains another provision that provides that "[i]f any
2 ordinance adopted pursuant to the Act is held to be invalid, unconstitutional or
3 otherwise unenforceable by a final judgment, the matter shall be referred to the City
4 Council" to have it decide "whether to amend the ordinance consistent with the
5 judgment, or whether to determine the section severable and ineffective."

6 63. The City Council is not a court and may not decide the legality of a
7 measure it unilaterally put before the voters. Under our system of government, the
8 decisions described above are not up to the City Council but are the province of the
9 courts. Measure B usurps the power of the judiciary to fashion an appropriate remedy
10 and to decide the severability of unlawful ordinances promulgated thereunder.

11 64. Section 1515-A has the additional effect of discouraging employees
12 from challenging Measure B in court, because even if they were successful, the City
13 could take the position that it has the sole and ultimate authority to decide their suit.

14 **RIGHT TO INJUNCTIVE AND DECLARATORY RELIEF**

15 65. No adequate remedy exists at law for the injuries suffered by SJPOA
16 members because the constitutional violations cannot be protected against and SJPOA
17 members' rights cannot be preserved absent injunctive relief. If this Court does not
18 grant injunctive relief of the type and for the purpose specified below, SJPOA and its
19 members will suffer further irreparable injury.

20 66. Conversely, the City will suffer no cognizable harm by continuing to
21 give effect to the Retirement Plan currently in place.

22 67. As a result, SJPOA requests that this Court preserve the *status quo*
23 *ante* by preliminarily and permanently enjoining the City from enforcing or otherwise
24 applying Measure B to its members.

25 68. An actual controversy has arisen and now exists between SJPOA and
26 the City concerning their respective rights, duties, and obligations under the
27 Retirement Plan. Plaintiff contends that by the foregoing acts and omissions, the City
28 has violated SJPOA members' rights under the California Constitution, the City

1 Charter, the Retirement Plan and the MOA, as well as the MMBA and California
2 Pension Protection Act.

3 69. SJPOA is informed and believes the City disputes the allegations
4 regarding its obligations under and violation of the law and the contractual agreements.

5 70. At all times mentioned herein, the City has been able to perform its
6 obligations under the law. Notwithstanding such ability, it failed and refused, and
7 continues to fail and refuse, to perform its duties under the law and the agreements.

8 71. SJPOA requests a judicial determination of its rights and a declaration
9 of the City's obligations under the California Constitution, the San Jose City Charter,
10 Retirement Plan and the MOA, as well as under the MMBA and California Pension
11 Protection Act. SJPOA further requests that this Court declare that Measure B is
12 unlawful and unenforceable as applied to SJPOA members currently employed by the
13 City, and that by purporting to apply Measure B to said employees the City violated its
14 obligations under the law.

15 **FIRST CAUSE OF ACTION**
16 **Impairment of Contract**
Cal. Const. art. I § 9 and Cal. Civ. Code § 52.1

17 72. Plaintiff hereby incorporates by reference the preceding paragraphs.

18 73. Article I, Section 9 of the California Constitution prohibits laws that
19 impair contracts. The City, in violation of Civil Code section 52.1³, has violated and
20 continues to violate the rights of Plaintiff's members herein alleged.

21 74. The Retirement Plan, as embodied in the San Jose Charter and
22 Municipal Code, gives rise to vested contractual rights for employees in the Plan on or
23 before June 5, 2012. Additionally, the MOA's sections on retirement benefits also
24 give additional contractual rights to SJPOA members.

25 75. Measure B substantially impairs the contractual rights of Plaintiff's
26 members.

27

³ Civil Code section 52.1 creates a private right of action to seek redress in the Superior
28 Court for violation of constitutional rights.

1 76. The substantial impairment is neither reasonable nor necessary to serve
2 an important public purpose. Nor is it consistent with the theory and purpose or tied to
3 the successful operation of the Retirement System.

4 77. Measure B, as applied to current employees, is unconstitutional and
5 violates Article I, Section 9 of the California Constitution.

6 **SECOND CAUSE OF ACTION**

7 **Taking**
8 **Cal. Const. art. I § 19 and Cal. Civ. Code § 52.1**

9 78. Plaintiff hereby incorporates by reference the preceding paragraphs.

10 79. Article I, Section 19 of the California Constitution prohibits the taking
11 of private property for public use in the absence of just compensation. The City, in
12 violation of Civil Code section 52.1, has violated and continues to violate the rights of
13 Plaintiff's members herein alleged.

14 80. SJPOA members have a vested property right in the benefits provided
15 by the Retirement Plan, and in the Retirement Plan itself, in place when they began
16 working for the City, as well as any enhancements made during their service with the
17 City.

18 81. In addition, the retirement benefits are a form of promised deferred
19 compensation. Measure B thus interferes with the investment-backed expectations of
20 SJPOA members.

21 82. By taking these protected benefits without giving SJPOA members any
22 comparable advantage, commensurate benefit or compensation, Measure B violates the
23 California Constitution as a taking of property for a public purpose without just
24 compensation.

25 83. Measure B will have a devastating economic impact on individual
26 SJPOA members both now and in the future.

27 84. The substantial impairment worked by Measure B is neither reasonable
28 nor necessary to serve an important purpose.

1 **THIRD CAUSE OF ACTION**

2 **Due Process**

3 **Cal. Const. art. I § 7 and Cal. Civ. Code § 52.1**

4 85. Plaintiff hereby incorporates by reference the preceding paragraphs.

5 86. Article I, Section 7 of the California Constitution prohibits the taking
6 of property without due process. The City, in violation of Civil Code section 52.1, has
7 violated and continues to violate the rights of Plaintiff's members herein alleged.

8 87. SJPOA members have a vested property right in the benefits provided
9 by the Retirement Plan, and in the Retirement Plan itself, in place when they began
10 working for the City, as well as any enhancements made during their service with the
11 City.

12 88. By taking these protected benefits without giving SJPOA members any
13 comparable advantage, commensurate benefit or compensation, Measure B violates the
14 California Constitution as a taking of property for a public purpose without due
15 process of law.

16 **FOURTH CAUSE OF ACTION**

17 **Freedom of Speech—Right to Petition**

18 **Cal. Const. art. I §§ 2 and 3, and Cal. Civ. Code § 52.1**

19 89. Plaintiff hereby incorporates by reference the preceding paragraphs.

20 90. Article I, Sections 2 and 3 of the California Constitution guarantee the
21 rights to freedom of speech and to petition the courts for redress. The City, in
22 violation of Civil Code section 52.1, has violated and continues to violate the rights of
23 Plaintiff's members herein alleged.

24 91. Section 1514-A of Measure B violates these protections by chilling or
25 otherwise discouraging SJPOA members from exercising their right to seek redress in
26 the courts by penalizing them for bringing a meritorious and successful lawsuit.
27 Measure B provides that if Section 1506-A(b) "is determined to be illegal, invalid or
28 unenforceable as to Current Employees[,]" current employees' salaries "shall" be
reduced by "an equivalent amount of savings."

1 92. This "poison pill" unlawfully penalizes SJPOA members if they
2 succeed in a lawsuit challenging Measure B. Among other things, there is no nexus
3 between the extracted "savings" to the City by reduced employee salaries and Section
4 1506-A(b); that is, there is no requirement the "savings" be used to pay UAL. Instead,
5 these deductions are wholly punitive in nature to discourage employees' exercise of
6 their fundamental right to petition the courts.

7 93. Section 1515-A of Measure B also violates the right to petition by
8 chilling or otherwise discouraging SJPOA members from exercising their right to seek
9 redress in the courts because it gives the City Council ultimate authority to decide
10 "whether to amend the ordinance consistent with the judgment, or whether to
11 determine the section severable and ineffective." Measure B discourages employees
12 from exercising their fundamental rights to petition the courts because, regardless of
13 any successful court judgment, the City Council usurps the judiciary's role to decide
14 the remedy, i.e., amendment or severability.

15 **FIFTH CAUSE OF ACTION**
16 **Separation of Powers Doctrine**
 Cal. Const. art. III § 3 and Cal. Civ. Code § 52.1

17 94. Plaintiff hereby incorporates by reference the preceding paragraphs.

18 95. Article III, Section 3 of the California Constitution provides for the
19 separation of powers between the legislative, executive, and judicial branches. The
20 City, in violation of Civil Code section 52.1, has violated and continues to violate the
21 rights of Plaintiff's members herein alleged.

22 96. Section 1515-A of Measure B violates the separation of powers
23 doctrine because it gives the City Council ultimate authority to decide "whether to
24 amend the ordinance consistent with the judgment, or whether to determine the section
25 severable and ineffective" if such ordinance is found to be "invalid, unconstitutional or
26 otherwise unenforceable." The City Council is not a court and may not decide the
27 legality of a measure it unilaterally put before the voters. Measure B thus usurps the
28

1 authority of the judicial branch because it allows the City Council to decide the
2 remedy if an ordinance is struck down, *i.e.*, amendment or severability.

3
4 **SIXTH CAUSE OF ACTION**
Breach of Contract

5 97. Plaintiff hereby incorporates by reference the preceding paragraphs.

6 98. The MOA is a valid and binding contract.

7 99. SJPOA members have at all times performed their duties under the
8 MOA by, among other things, serving the City of San Jose in Police Officer
9 classifications.

10 100. The City has breached the MOA by the actions and omissions alleged
11 above. Specifically, Measure B, which the City Council drafted and voted to place on
12 the June 2012 ballot as a voter initiative, denies or otherwise reduces gross and net
13 salaries, increases employee deductions, contributions, and withholdings, and
14 decreases retirement benefits agreed to in the MOA.

15 101. Additionally, the poison pill further breaches the MOA by unilaterally
16 reducing the salaries of Police Officers by as much as 16%.

17 102. SJPOA members will suffer damages, as described above, caused by
18 the City's breach of the MOA, in the form of reduced salaries and retirement benefits.

19 **SEVENTH CAUSE OF ACTION**
Violation of MMBA
Gov. Code § 3512 *et seq.*

20
21 103. Plaintiff hereby incorporates by reference the preceding paragraphs.

22 104. The MMBA prohibits the City from taking unilateral action on matters
23 impacting wages, hours, and other terms and conditions of employment for Police
24 Officers without first providing the SJPOA with reasonable notice and an opportunity
25 to bargain, resolve any differences, and reach agreement prior to implementation.
26 Gov. Code § 3504.5. "The duty to bargain requires the public agency to refrain from
27 making unilateral changes in employees' wages and working conditions until the
28 employer and employee association have bargained to impasse." *Santa Clara County*

1 *Counsel Attorneys Assoc. v. Woodside* (1994) 7 Cal.4th 525, 537. The SJPOA and the
2 City have not bargained to impasse.

3 105. Section 1506-A of Measure B violates the MMBA both substantively
4 and procedurally because it directs that the City shall unilaterally reduce salaries by as
5 much as 16% if the VEP is "illegal, invalid or unenforceable as to Current
6 Employees," without requiring the City to bargain over such reductions and/or even if
7 bargaining were to take place it makes the amount of salary reductions non-negotiable.

8 106. Section 1512-A violates the MMBA both substantively and
9 procedurally because it unilaterally effects an increase in employee contributions for
10 retiree healthcare benefits and, consequently, reduces net salaries. It also violates the
11 MMBA because it effectively eliminates the SJPOA's ability to bargain with the City
12 over retiree healthcare benefits, when such benefits are a mandatory subject of
13 bargaining under the MMBA.

14 **EIGHTH CAUSE OF ACTION**
15 **California Pension Protection Act**
16 **Cal. Const. art. XVI, § 17 and Cal. Civ. Code § 52.1**

17 107. Plaintiff hereby incorporates by reference the preceding paragraphs.

18 108. Article XVI, section 17 of the California Constitution provides that a
19 public employee retirement board's fiduciary duties are to current and future retirees
20 and their beneficiaries. It further provides that the retirement board "shall have
21 plenary authority and fiduciary responsibility for investment of moneys and
22 administration of the system" The City, in violation of Cal. Civ. Code section
23 52.1, has violated and continues to violate the rights of plaintiff's members herein
24 alleged.

25 109. Measure B violates the California Constitution because it compromises
26 the Retirement Board's constitutionally-based fiduciary duties to SJPOA members,
27 who participate in the plan as future retirees, by compelling the Board to consider "any
28 risk to the City and its residents" in its actuarial analyses and by compelling the

1 Retirement Board to equally "ensure fair and equitable treatment for current and future
2 plan members *and taxpayers* with respect to the costs of the plans"

3 PRAYER

4 WHEREFORE, Plaintiff SJPOA prays for the following relief:

5 1. A declaration that:

6 a. Measure B cannot be applied to SJPOA members working for the
7 City on or before June 5, 2012;

8 b. the City was and is required to provide SJPOA members with the
9 retirement benefits and Retirement Plan in place when they began working for the
10 City, as well as any enhancements made during their service with the City;

11 c. the City is required to provide the retirement benefits delineated
12 in the MOA;

13 d. and, by the above-described actions and omissions, the City
14 violated its obligations.

15 2. A preliminary and permanent injunction prohibiting the City from
16 applying or otherwise enforcing any part of Measure B to SJPOA members working
17 for the City before June 5, 2012;

18 3. For any and all actual, consequential, and incidental damages as
19 against the City according to proof, including but not limited to damages that have
20 been or may be suffered by members of SJPOA and all costs incurred by SJPOA in
21 attempting to enforce the constitutional and statutory rights of the association and its
22 members;

23 4. For attorneys' fees as against the City pursuant to California Code of
24 Civil Procedure section 1021.5, Government Code section 800, or otherwise;

25 \\\

26 \\\

27 \\\

28 \\\

1 5. For costs of suit herein incurred; and,

2 6. For such costs and further relief as the Court deems just and proper.

3
4 Dated: July 5, 2012

5 CARROLL, BURDICK & McDONOUGH LLP

6
7 By 

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